Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MELANIE BENNETT AND LYNN HARRELL,
Petitioners

v.

RICHARD BARNETT, KEVIN FORD,
GUY ROBINSON, AND BARBARA A. HARRIS,
Executrix of the Estate of Jack L. Harris

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL ADELMAN
Counsel of Record
Adelman and Steiner
224 Second Avenue
Hattiesburg, Ms. 39401
(601) 544-8291
ANTON G. HAJJAR
of Counsel
O'Donnell, Schwartz, and
Anderson, P.C.
1300 L St., N.W., Ste. 1200
Washington, D.C. 20005
(202) 898-1707

65pp

QUESTION PRESENTED FOR REVIEW

Over 700,000 bargaining-unit employees of the United States Postal Service are unique among federal employees because their employment is governed by collective bargaining agreements between several national unions and the Postal Service, rather than by the Civil Service Reform Act or similar statutory scheme. The question presented for review is:

> Whether Congress, by authorizing a grievance procedure modeled on those in the private sector, intended for the grievance procedure contained in the Collective Bargaining Agreement between the Postal Service and the American Postal Workers Union, AFL-CIO, to displace civil actions for damages for violations of constitutional rights under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) for bargaining unit employees?

PARTIES TO THE PROCEEDINGS

Petitioners, the Plaintiffs-Appellants below, are United States Postal Service employees Melanie Bennett and Lynn Harrell. The Respondents, Defendants below, are Postal Inspectors Kevin Ford and Guy Robinson; postal supervisor Richard Barnett; and Barbara Harris, executrix of the estate of Jack L. Harris, a deceased Postmaster. The United States was an additional party below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Melanie Bennett and Lynn Harrell, respectfully ask the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. 1a-11a) is reported at 210 F.3d 272 (5th Cir. 2000). The opinion of the district court entered on Nov. 24, 1998 (App. 12b-35b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2000. This Petition for Writ of Certiorari was filed on July 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 2105(e) (1994) provides:

> Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title.

39 U.S.C. § 410(a) (1994) provides:

> Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the

provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

39 U.S.C. § 1206(b) (1994) provides:

Collective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration, or the parties may adopt any such procedures by mutual agreement in the event of a dispute.

39 U.S.C. § 1209(a) (1994) provides:

Employee-management relations shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of subchapter II of chapter 7 of title 29.

STATEMENT OF THE CASE

Petitioners Melanie Bennett and Lynn Harrell are employees of the United States Postal Service in Hattiesburg, Mississippi. Both are members of the American Postal Workers Union, AFL-CIO, (APWU or Union), their exclusive bargaining representative.

On Oct. 24, 1996, Harrell was interviewed by Postal Inspector Kevin Ford concerning his role in an alleged verbal assault with another employee. Bennett was present as a union steward. Well into this interview, Ford learned that Harrell owned several guns, including one that was in his car, parked in the customer parking lot of the Post Office. Another Postal Inspector, Guy Robinson, was called in.

The two Inspectors then began trying to get Harrell to sign a consent-to-search form so they could retrieve the gun. (App. 13-14b).

Because the investigation had turned from administrative to criminal, Bennett advised Harrell that he should not make any more statements or sign anything, or consent to further interview, and attempted to get Harrell to leave the interview. (App. 14-15b).[1]

The Postal Inspectors asked Bennett to be quiet and cease interfering with the interrogation. When she refused, Ford and Robinson, and the acting Postmaster, Jack Harris, ordered Bennett to leave the room. Bennett refused to do so. Robinson then forcibly removed her from the building. (App. 15b).

Harrell eventually agreed to sign the consent-to-search form. His car was searched and his gun was confiscated. Harrell was then released, no charges were ever brought against him for possession of a firearm on postal property, and the pistol was later returned to him. (App. 15-16b).

Immediately after Bennett's return to work, Richard Barnett, her immediate supervisor, acting on the direct instructions of Postmaster Harris, began har-

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[1] Bennett and Harrell alleged in the original complaint that by this time Harrell had been placed in a custodial criminal interrogation. (1 R. 2). In granting the Defendants' Motion for Summary Judgment on the *Bivens* actions, the district court did not reach the merits of the claims. (App. 26b, n. 1). Subsequently, however, at trial, the court found that the interrogation had clearly turned from civil to criminal, (4 R. 137; 138; 141; 142), and that the Inspectors never read Harrell his Miranda rights (4 R. 141-42). The court found that Bennett asked the Inspectors whether Harrell was free to leave and was advised that Harrell could not leave. Ford testified at trial that Harrell had not been arrested, but that he was in custody pending resolution of the gun matter. (4 R. 138). Robinson agreed with Ford that the gun had to be recovered before Harrell would be allowed to leave. (4 R. 139). Bennett was insisting that Harrell be allowed to call an attorney. (4 R. 138; 139).

assing and intimidating her in retaliation for her role in the incident. Bennett was suspended for fourteen days on pretextual grounds, needlessly investigated for "bogus charges," verbally reprimanded for trivial matters, harassed in other ways, and was eventually terminated from her job. (App. 16b).[2]

Bennett and Harrell filed a civil action against the two supervisors and two Postal Inspectors for damages for violations of their rights under the First, Fourth, and Fifth Amendments to the United States Constitution arising out of the criminal investigation by the Postal Inspection Service, relying on this Court's decisions in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and invoking federal court jurisdiction under 28 U.S.C. § 1331. They alleged that these postal officials had conspired to and did knowingly and willfully violate their constitutional rights. Specifically, Harrell alleged unreasonable search and seizure and compelled self-incrimination, and Bennett alleged retaliation for exercising her First Amendment right to verbally challenge the federal law enforcement officers in the form of forced expulsion from the building, followed by a fourteen-day suspension from work. They later amended the complaint to add claims under the Federal Tort Claims Act (FTCA). Bennett also amended the complaint to allege that she was fired in retaliation for filing this suit in fur-

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[2] For summary judgment purposes on the *Bivens* issue, the court assumed that the harassment had occurred. At trial on Dec. 18, 1998 on the FTCA claims, however, the court specifically found that Bennett was subjected to "a directed, intentional, concerted course of conduct" of harassment, directed by Harris through Barnett, (4 R. 148), and that "the United States Postal Service ha[d] committed an intentional tort of intentional infliction of emotional distress on her by harassing her since October the 24th, 1996," a twenty-six month period. (4 R. 149).

ther violation of her First Amendment rights.

In an Opinion and Order dated Nov. 24, 1998, the district court granted summary judgment to the Defendants on the *Bivens* claims, holding that all of the constitutional claims were barred by the collective bargaining agreement (CBA), but allowed Bennett's claims under the FTCA to go to trial.

On appeal, the court of appeals affirmed the district court's decision on the *Bivens* issue, but reversed on the FTCA claims. The Petitioners ask the Court to issue a writ of certiorari only on the *Bivens* issue.

REASONS FOR GRANTING THE WRIT

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that individuals whose constitutional rights were violated by federal officers could sue for damages.

In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court limited the right of employees covered by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. §§ 1101 *et seq.* (1994) (CSRA) to file *Bivens* actions. The *Bush* Court held that because the claims arose out of an employment relationship governed by a comprehensive statutory remedial scheme, culminating in judicial review, which adequately protected the employees' constitutional rights, that "special factors counsel[ed] hesitation [against] authorizing a new kind of federal litigation." 462 U.S. at 378.

This case presents an important question of federal law that has not been, but should be, settled by this Court under Sup. Ct. R. 10(c): Whether the principles set forth in *Bush*, applicable to employees under the CSRA, should apply to postal employees, covered by collective-bargaining agreements between

management and unions under the National Labor Relations Act of 1935, 29 U.S.C. §§ 151 *et seq.* (1994) (NLRA).

This Court's intervention is needed because the clear dictates of Congress—that postal employees be treated as private sector employees—along with a major line of Supreme Court labor law precedents, and the teachings of this Court on *Bivens* preclusion, are being consistently ignored by the courts below. *See Pereira v. United States Postal Serv.*, 964 F.2d 873, 876 (9th Cir. 1992); *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275-76 (10th Cir. 1991); *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Ellis v. United States Postal Serv.*, 784 F.2d 835, 839-40 (7th Cir. 1986); *see also Bradley v. United States Postal Serv.*, 832 F.2d 1061, 1062 (8th Cir. 1987) (per curiam); *Harding v. United States Postal Serv.*, 802 F.2d 766, 767-68 (4th Cir. 1986) (focusing on remedies available under the CSRA, but mentioning remedies under CBA).

The errors of these courts have important institutional consequences, and there is virtually no chance of correction by the lower courts on their own initiative. Contrary to the holdings of the lower courts, Congress could not have intended its authorization of a private-sector model grievance procedure, which leaves all grievances in the hands of the union charged by law with protecting *collective* interests, and which gives no recourse to employees whose *individual* constitutional rights have been violated, to have displaced *Bivens* remedies.

Postal employees are not covered by the CSRA. The United States Postal Service is an "independent establishment of the executive branch" of the federal government. 39 U.S.C. § 201 (1994). Its employees are federal employees within the "postal career service." 39 U.S.C. § 1001(b) (1994). The CSRA ex-

pressly states that "[e]xcept as otherwise provided by law, an employee of the United States Postal Service * * * is deemed not an employee for purposes of this title." 5 U.S.C. § 2105(e) (1994).[3]

Instead, postal employment is governed by the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (PRA). Postal employees—unique among federal employees—have the right to engage in private-sector collective-bargaining under the NLRA and the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* (1994) (LMRA).[4] 39 U.S.C. §§ 1209(a)-(b) (1994). The legislative history also makes clear that Congress modeled collective bargaining in the Postal Service on the private sector's experience. H.R.Rep. No. 91-1104, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 3649, 3662. The PRA authorizes, but does not mandate, the parties to negotiate a grievance procedure culminating in arbitration "for resolution by the parties of grievances and adverse actions arising under the agreement." 39 U.S.C. § 1206(b) (1994).

Neither the district court nor the court of appeals made any findings on whether the grievance procedures are adequate to protect constitutional rights,[5] *or*

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[3] A minor exception is made for a small class of employees under the Veterans' Preference Act who face discharge or other major adverse actions. 39 U.S.C. § 1005(a)(4) (1994). Although petitioner Harrell is a preference eligible employee, this case does not involve appealable adverse actions.

[4] In contrast, at most federal agencies, labor relations are governed by the Federal Service Labor-Management Relations Statute (FSLMRS) (5 U.S.C. § 7101 *et seq.* (1994)).

[5] In *Winston v. United States Postal Serv.*, 585 F.2d 198 (7th Cir. 1978), the court held that the grievance procedures are adequate to protect procedural due process in property rights

(Continued on page 8)

indeed whether such violations are even cognizable or arbitrable under the procedures.[6] Indeed, the record shows that constitutional and other legal claims are *not* arbitrable (3 R. 596-611)—a fact which the court below considered immaterial.

Rather, the court below held that when there exists a "comprehensive statutory scheme to address a particular class of claims, the courts will not act to create additional judicial remedies, *even where a particular litigant does not have a remedy available under the statutory scheme.*" (App. at 7a, quoting *Pipkin v.*

(Continued from page 7)

created by the contract (i.e., the right to notice of the charges and the right to a hearing). *Id.*, at 207-210. The question whether grievance procedures adequately protect substantive claims is obviously different. This Court has held that grievance procedures are not adequate substitutes for a judicial forum for substantive constitutional claims. *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984).

[6] Because Congress imposed the private sector labor-relations scheme, the traditional definition of "grievance," common in the labor law context, applies to postal CBAs. As this Court has stated :

> We think it more likely that "grievances," like disputes over "the interpretation or application" of CBAs, refers to disagreements over how to give effect to the bargained-for agreement. The use of "grievance" to refer to a claim arising out of a CBA is common in the labor law context in general, see, *e.g., United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987), and it has been understood in this way in the RLA context.

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 254 (1994).

In *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), the Court held that the presumption of arbitrability "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA.*" *Id.*, at 78. The Court further held that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA," leaving for another day the question whether the rights in question can be waived at all. *Id.*, at 80.

United States Postal Serv., 951 F.2d 272, 275 (10th Cir. 1991) (emphasis added by the Court of Appeals for the Fifth Circuit)).

According to the court below, moreover, postal employees would have no access to the courts for *Bivens* remedies *no matter how egregious the misconduct of Postal Inspectors.*

The Petitioners submit that the holding below extends *Bush v. Lucas* much further than this Court ever envisioned, and that Congress did not intend a constitutional cause of action for damages to be displaced by a collective bargaining agreement, leaving a large class of 718,000[7] bargaining-unit employees without an effective means to vindicate violations of their constitutional rights.

I. THE DECISION BELOW IS IN CONFLICT WITH *MCCARTHY V. MADIGAN.*

In *McCarthy v. Madigan*, 503 U.S. 140 (1992), this Court made it clear that the *Bush-Chilicky* line of cases was grounded in the intent of Congress to displace *Bivens* remedies, and that the mere existence of a grievance procedure does not suffice to do so. *See also Krueger v. Lyng*, 927 F.2d 1050, 1055 (8th Cir. 1991) ("Only Congress has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action.") In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), claimants who experienced long delays in receiving Social Security benefits to which they were entitled sued for damages for hardships caused by the delays. This Court held that "'special factors' include the existence of statutory mechanisms giving

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[7] There are approximately 797,795 career employees in the Postal Service. U.S. Postal Service, *1999 Annual Report* 78 (1999). Almost ninety percent of them are covered by CBAs. *Ibid.*, at 62.

meaningful remedies against the United States, even though those remedies do not provide 'complete relief'." *Id.* Moreover, in *Chilicky*, the Court explained that, "In light of the comprehensive statutory schemes involved, the harm resulting from the alleged constitutional violation can in neither case be separated from the harm resulting from the denial of the statutory right." *Id.*, at 428. The Court further noted that, "Once these elaborate administrative remedies have been exhausted, a claimant is entitled to seek judicial review, including review of constitutional claims. *Id.*, at 424.

The *McCarthy* Court held that a grievance procedure for prisoners, promulgated by the Federal Bureau of Prisons, did not need to be exhausted by a prisoner alleging violations of the Eighth Amendment by the deliberate indifference to his medical needs. The Court reminded the parties that "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them" and "'[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Id.* at 146 (internal citations omitted).

Addressing the implied exception to *Bivens*, the Court said:

> As to the second exception, respondents appear to confuse the presence of *special* factors with *any* factors counseling hesitation. . . .
>
> Interpreting the "special factors" exception in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), and in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme. *Schweiker*, 487 U.S., at 425; *Bush*, 462 U.S., at 388. "When the design of a Government program suggests that Congress has

> provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Schweiker*, 487 U.S., at 423. Here Congress has enacted nothing.

Id. at 151-152.

The *McCarthy* Court observed that the prison grievance procedure "was neither enacted nor mandated by Congress," and said that the defendants "confuse what Congress could be claimed to allow by implication with what Congress affirmatively has requested or required." *Id.* at 149.[8] The Court held that the grievance procedure was promulgated under the general delegation of rulemaking authority to the

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[8] Like *McCarthy*, in *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991), the court allowed a *Bivens* action by a Department of Agriculture county executive director (who is not covered by civil service laws), alleging that he was removed for whistleblowing, against officials of the Department of Agriculture. DOA regulations specified that he served at the pleasure of the county commission and gave him very limited appeal rights. The regulations were not mandated by statute; they were promulgated pursuant to DOA's general rulemaking authority. The court also thought that it would violate separation-of-powers principles to allow an "administratively-created scheme" to preclude court jurisdiction over this claim. *Id.* The court concluded that "Congress never has given a moment's thought to the question of what sort of remedies should be available to ASCS county office employees like Krueger." *Id.* at 1057.

In *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998), the court followed *Krueger* and held that an applicant for chief probation officer could file a *Bivens* action against a panel of U.S. District Court judges, even though the plaintiff could have filed a complaint under the internal EEO Plan. The court contrasted the CSRA, which "provided ultimately for some judicial review." *Id.* at 1034. The court ruled that "the Panel has presented no support that Congress intended to delegate to the Judicial Conference the authority to preempt a *Bivens* action in favor of administrative remedies." *Id.* at 1035.

Bureau, and thus exhaustion was not required. *Id.*

As in *McCarthy*, although authorizing the contracting parties to adopt a grievance procedure in their collective bargaining agreement, in the PRA, Congress "has enacted nothing."

Moreover, Congress could not possibly have considered the CBA to be an adequate remedial mechanism. As this Court has explained:

> [B]ecause an arbitrator's authority derives solely from the contract, *Barrentine* [*v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)], *supra*, at 744, *an arbitrator may not have the authority to enforce § 1983.* As we explained in *Gardner-Denver*: *"The arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . .* If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." 415 U.S., at 53, quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Indeed, *when the rights guaranteed by § 1983 conflict with provisions of the collective-bargaining agreement, the arbitrator must enforce the agreement.* *Gardner-Denver*, 415 U.S., at 43.

McDonald v. City of West Branch, 466 U.S. 284, 290-291 (1984) (emphasis added).

"[U]nless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts

for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

II. GIVEN THE WELL-UNDERSTOOD NATURE OF THE COLLECTIVELY BARGAINED GRIEVANCE-ARBITRATION PROCESS, CONGRESS DID NOT INTEND *BIVENS* ACTIONS TO BE DISPLACED BY THAT PROCESS.

There are other compelling reasons to conclude that Congress did not intend *Bivens* actions to be displaced by a collective bargaining agreement. These reasons flow from the fact that labor relations in the Postal Service are based on the private-sector labor law model.

A. The Union Controls the Grievance-Arbitration Process.

"[T]he question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis v. Passman*, 442 U.S. 228, 241 (1979). The Petitioners submit that Congress could not have intended to entrust the vindication of individual constitutional rights to unions; by statute, unions are primarily concerned with collective interests, and their obligation to the individual is subject only to the duty of fair representation.

It is settled that the parties to a CBA are the union and the employer, not the individual grievant, and that the union controls the grievance process. "Although each party participates in the grievance procedure, the union plays a pivotal role in the process since it assumes the responsibility of determining whether to press an employee's claims." *Bowen v. United States Postal Serv.*, 459 U.S. 212, 225 (1983). The individual employee cannot proceed independently of the union. *Id.* at 216, n. 5. The union, as

the exclusive agent of the employee, alone decides whether to process a grievance or invoke arbitration, subject only to the duty of fair representation. *Id.* at 226.

"A breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The union can refuse to process a grievance for any number of reasons, unrelated to the merits, without violating the duty of fair representation. For example, a union may perceive that not pressing a grievance would advance the common good, or the union may be ignorant of the law, or even merely negligent.

The duty of fair representation was created by the Court precisely because, in the collective bargaining scheme, individual rights are subordinate to collective interests. As this Court has explained:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation."

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976) (quoting *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)); *see also, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) ("We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational"); *United*

Steelworkers v. Rawson, 495 U.S. 362, 372-73 (1990) ("The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today").

Even if a postal union were willing to grieve and arbitrate constitutional claims (assuming that such claims are even cognizable, see note 6, *supra*), it is likely that union representatives will make mistakes about the merits of these claims, as will arbitrators hearing such claims; most arbitrators are not lawyers. For these reasons, as we show below, this Court has consistently refused to require employees to submit legal claims to the contractual forum, and when unions on their behalf have done so, has permitted employees to pursue such claims in court notwithstanding adverse arbitration awards.

B. Individual Rights Existing Independent of the Collective Bargaining Agreement are Separate and Distinct from Rights Arising Under the Collective Bargaining Agreement.

As this Court has recognized in *McDonald v. City of West Branch*, 466 U.S. 284 (1984): "[A]lthough arbitration is well suited to resolving contractual disputes, . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that [42 U.S.C.] § 1983 is designed to safeguard." *Id.*, at 290. The Court proceeded to list four reasons—all applicable to Petitioners' claims here—supporting the conclusion that an employee may bring his legal claims to federal court. First, "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.'" *Id.* (*quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)). Second, be-

cause an arbitrator's authority derives only from the collective bargaining agreement, he may have no authority to protect non-contractual rights. Third, the employee's union usually controls presentation of the employee's case to the arbitrator, even though the union's interests may not always be compatible with the employee's. Last, arbitral fact-finding is not as extensive as, and is not accompanied by the safeguards accompanying judicial fact-finding. *McDonald*, 466 U.S. at 290-91.

In the same vein, the Court has held that employees are free to bring actions arising under state law when such claims do not require interpretation of the collective bargaining agreement. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Court quoted:

> "This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, *e. g., McDonald v. West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*' *Barrentine, supra*, at 737." *Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 564-565 (1987) (emphasis added).

Lingle, 486 U.S. at 411-12.

This Court summarized its reasoning in the

Gardner-Denver line of cases:

> Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights . . . .

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

For much the same reason, the decision below cannot be reconciled with yet another decision of this Court (*Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998):

> ALPA urges extension of the discretionary exhaustion-of-remedies doctrine to agency-fee arbitration. *See* Brief for Petitioner 19 (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs.")). But a principal purpose of that doctrine is not relevant here. "[T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy*, 503 U.S., at 145. *ALPA seeks exhaustion not of an administrative remedy established by Congress but of an arbitral remedy established by a private party.* Ordinarily, "arbitration is a matter of contract

> and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995) ("a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute").

Air Line Pilots Ass'n, 523 U.S. at 875-876 (emphasis added) (footnote omitted).

C. Arbitration Awards are Insulated from Judicial Review.

Congress could not have intended to require postal employees to grieve and arbitrate their constitutional claims because, under applicable labor laws, meritorious claims of constitutional violations will rarely, if ever, be heard in court.

Suits against the Postal Service to confirm or vacate arbitration awards arise under PRA Section 1208(b), 39 U.S.C. § 1208(b) (1994). PRA Section 1208(b) is the analogue of the Taft-Hartley Act, Section 301(a), 29 U.S.C. § 185(a) (1994). *See, e.g., Bowen v. United States Postal Serv.*, 459 U.S. 212, 232 n. 2 (1983) (White, J., concurring in part and dissenting in part); *Miller v. United States Postal Serv.*, 985 F.2d 9, 10 n. 1 (1st Cir. 1993); *McNair v. United States Postal Serv.*, 768 F.2d 730, 735 (5th Cir. 1985); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1174 (D.C. Cir. 1978).

Because most collective-bargaining agreements accord finality to grievance-arbitration procedures established by the agreement, an employee normally cannot bring a Section 301 action against an employer unless he can show that the union breached

its duty of fair representation in its handling of his grievance. *See, e.g., DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983). The CBA in this case in fact provides that the decisions of an arbitrator are final and binding. (3 R. 612 at p. 102).

Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement, and that the union breached its duty of fair representation. *See, e.g., DelCostello*, 462 U.S. at 164-165.

Accordingly, unless the union had breached its duty of fair representation, the aggrieved individual could not obtain judicial review of an arbitration award denying the employee's constitutional claim.[9]

In *Webster v. Doe*, 486 U.S. 592 (1988), a homosexual Central Intelligence Agency employee sued under the Administrative Procedure Act[10] over his discharge as a security threat, alleging violations of various constitutional rights, and sought declaratory

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[9] Even were the union willing to sue to vacate an unfavorable award, settled principles would make such review virtually unavailable. Judicial review of arbitration awards is extremely limited—in fact, it is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978). Courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Indeed, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* This is true even for constitutional questions. *See American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 6 (D.C. Cir. 1986) (holding that an arbitrator's mistaken application of *Miranda* is not grounds to vacate an award).

[10] The Postal Service is exempt from the provisions of the Administrative Procedure Act. 39 U.S.C. § 410(a).

and injunctive relief. The CIA argued that there was no judicial review because the statute at issue allowed the Director "in his discretion [to] terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." *Id.*, at 594. This Court held that this provision did not preclude judicial review. Chief Justice Rehnquist, writing for the Court, stated:

> [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

Webster v. Doe, 486 U.S. at 603 (internal citations omitted).

Following *Webster v. Doe*, this Court should hold that the PRA does not preclude the adjudication of constitutional claims in federal court.

CONCLUSION

The Petitioners submit that Congress never intended to leave individual constitutional rights, enshrined at the pinnacle of rights which are beyond tampering by the government, to a collectively-bargained grievance process.

Moreover, this Court has stated, "[W]e have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course." *Livadas v. Bradshaw*, 512 U.S. 107, 130 (1994).

For these reasons, this Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be

granted.

DATED this 11th day of July 2000.

Michael Adelman
Counsel of Record
Adelman and Steiner
224 Second Avenue
Hattiesburg, Ms. 39401
(601) 544-8291
Anton G. Hajjar
of Counsel
O'Donnell, Schwartz, and
Anderson, P.C.
1300 L St., N.W., Ste. 1200
Washington, D.C. 20005
(202) 898-1707

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60166

Melanie BENNETT; Lynn Harrell,
Plaintiffs-Appellants-Cross-Appellees,
v.
Richard BARNETT; Kevin Ford;
Guy Robinson; Barbara A. Harris,
Executrix of the Estate of Jack L. Harris,
Defendants-Appellees,
United States of America,
Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Mississippi

April 12, 2000

Before HIGGINBOTHAM and PARKER, Circuit Judges; and WARD, District Judge.[1]

ROBERT M. PARKER, Circuit Judge:

This case arises out of an internal investigation by the United States Postal Service of an altercation between two postal workers. Plaintiff-Appellants sought damages for constitutional violations against

[1] District Judge of the Eastern District of Texas, sitting by designation.

individual federal employees pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and against the United States under the Federal Tort Claims Act ("FTCA"). The district court dismissed the *Bivens* claims as preempted by the plaintiffs' collective bargaining agreements and held a trial on the FTCA claims of plaintiff Melanie Bennett while dismissing all other FTCA claims. Bennett was awarded $2,500 on one of her FTCA claims. The plaintiffs appeal and the United States cross-appeals.

FACTUAL HISTORY AND PROCEEDINGS BELOW

Plaintiff Lynn Harrell and another postal employee got into an argument wherein the latter told Harrell that they could settle the situation "any place and anytime." Richard Barnett, a customer services supervisor, heard about the altercation and put both employees on administrative leave. Postal inspector Kevin Ford began investigating the situation and arranged an initial interview with Harrell. The events that occurred during this interview led to the filing of this lawsuit.

Harrell's union steward, Melanie Bennett, was permitted to attend the interview. The questioning turned toward whether Harrell owned a gun. Harrell admitted that he owned a gun and that he had, in fact, brought it to work with him the day of the interview. Ford summoned another inspector to assist in the interview and then sought to obtain Harrell's consent to a search for the gun in his car. At this point, Bennett interrupted and attempted to persuade Harrell to leave the room. The interviewers (now including Bennett's supervisor, Jack Harris) asked Bennett to be quiet and even to leave the room. Bennett refused both requests. Harrell admits that he was not mistreated. After repeatedly refusing to leave the interview, Bennett was forcibly removed from the room

by another postal inspector, Guy Robinson.[2]

Harrell eventually signed the consent form and the gun was subsequently taken from his car. After a full investigation, Harrell was reinstated to his previous position and his gun was returned to him. Bennett was suspended for her actions during the interview. Bennett claims that she was suspended on pre-textual grounds, needlessly investigated for "bogus charges" and subsequently harassed in other ways.

This action was filed on October 11 [sic], 1997. Bennett claims that her First Amendment rights were violated. Harrell claims that his Fourth, Fifth and Sixth Amendment rights were violated. On July 27, 1998, both Bennett and Harrell added the United States as a defendant and asserted claims under the FTCA, including intentional infliction of emotional distress, assault, battery and false imprisonment.

STANDARD OF REVIEW

The district court's determination that the remedies provided by the plaintiffs' collective bargaining agreements pre-empt their *Bivens* claims is a question of law. The district court's determination whether plaintiffs' claims presented a "substantial question" of coverage under the FECA is also a question of law. "This court reviews *de novo* a district court's conclusions on questions of law." *Hart v. Bayer Corp.*, 199 F.3d 239, 243 (5th Cir. 2000).

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[2] Bennett filed criminal charges against Robinson for physically removing her from the building. The municipal court in Hattiesburg, Mississippi directed a verdict of not guilty at the close of the city's case.

DISCUSSION

I. Constitutional (Bivens) Claims.

The district court's analysis of the plaintiffs' *Bivens* claims centers on the question of whether such claims are viable in the government-employee and government-employer relationship. In *Bush v. Lucas*, 647 F.2d 573 (5th Cir. Unit B 1981), *aff'd*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), this circuit held that *Bivens* did not apply in the context of the federal employee-employer relationship. The "relationship" was a "special factor" that counseled hesitation against the judicial creation of a damage remedy for the deprivation of a federal employee's constitutional rights. *See Bush*, 647 F.2d at 577. After assuming that the petitioner's constitutional claims had merit and that the civil service remedies were less compensatory than an individual damage remedy,[3] the Supreme Court affirmed this circuit's opinion and noted the following:

> [W]e do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights. As we did in Standard Oil, we decline "to create a new substantive legal liability without legislative aid and as at the common law," because we are convinced that Congress is in a better position to decide whether or not the public in-

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[3] "We assume for purposes of decision that petitioner's First Amendment rights were violated by the adverse personnel action. We also assume that, as petitioner asserts, civil service remedies were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered." *Bush*, 462 U.S. at 367, 103 S.Ct. 2404.

terest would be better served by creating it. *Bush*, 462 U.S. at 390, 103 S.Ct. 2404 (citation omitted). In other words, the *Bush* Court left it up to Congress to provide the appropriate remedy.

Chapters 10 and 12 of the Postal Reorganization Act ("PRA") set out a comprehensive scheme governing employment relations within the Postal Service. *See* 39 U.S.C. §§ 1001-11, 1201-09 (1994). Although the Civil Service Reform Act ("CSRA") generally excluded postal employees from its coverage, *see* 5 U.S.C. § 2105(e) (1994), the PRA provided for CSRA coverage for some postal employees, called "preference eligible" postal employees, who are entitled to avail themselves of the CSRA's procedures for administrative and judicial review of adverse personnel actions. *See* 39 U.S.C. § 1005(a)(4) (1994).[4] For other postal employees, such as the plaintiffs, the Postal Service shall establish procedures guaranteeing them "an opportunity for a fair hearing on adverse actions, with representatives of their own choosing." 39 U.S.C. § 1001(b) (1994).[5]

Under the PRA, postal employees have collective bargaining rights. The PRA also provides that employee-management relations are generally subject to

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[4] *See Kroll v. United States*, 58 F.3d 1087, 1091 (6th Cir. 1995) ("Indeed, we find that the extent to which the PRA removed the USPS and its employees from the general provisions related to government organizations and employees as expressed in Title 5 clearly illustrates the intent to make the PRA as codified in Title 39, a comprehensive scheme governing the USPS and its employees.").

[5] A number of courts have recognized that Postal Service grievance procedures are constitutionally sufficient, and preclude constitutional causes of action against postal officials. *See, e.g., Bradley v. United States Postal Serv.*, 832 F.2d 1061, 1062 (8th Cir. 1987); *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986); *Ellis v. United States Postal Serv.*, 784 F.2d 835, 840 (7th Cir. 1986).

the provisions of the Labor Relations Management Act (LRMA [sic]) and the National Labor Relations Act ("NLRA"). *See* 39 U.S.C. § 1209(a)-(b) (1994). The collective bargaining agreements may include "any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration." 39 U.S.C. § 1206(b) (1994). The collective bargaining agreement in effect during the actions described herein contained such provisions.

In *Pipkin v. United States Postal Serv.*, 951 F.2d 272 (10th Cir. 1991), the court dismissed a postal employee's *Bivens* claims, citing its deference to Congress's judgment in creating the collective bargaining agreement system for postal employment disputes.

> Congress explicitly authorized the USPS to adopt comprehensive binding arbitration provisions in its collective bargaining agreements between the USPS and its employees. The applicable collective bargaining agreement provided grievance procedures, including arbitration, to address plaintiffs' disputes arising from the employment relationship. Because Congress has provided a comprehensive procedure to address postal employees' constitutional claims arising from their employment relationship with the USPS, those arbitration procedures preclude plaintiffs' *Bivens* claims.

Pipkin, 951 F.2d at 275 (citation omitted). *See also Eure v. United States Postal Serv.*, 711 F.Supp. 1365, 1371 (S.D.Miss. 1989) ("[B]ecause plaintiffs in their positions as federal employees of the Postal Service had access to the Congressionally approved grievance procedure of the collective bargaining agreement, then it follows that plaintiffs may not maintain their federal constitutional claims against the certain named individual Postal Service officials.").

Plaintiffs argue that the procedures contained in

their CBA do not constitute "alternative procedures" which provide meaningful remedies against the Postal Service or the United States. The district court rejected this argument. In *Pipkin* the court also rejected this argument and emphasized the comprehensive nature of the statutory scheme to address the claims of postal employees.

> When Congress has acted to create a comprehensive statutory scheme to address a particular class of claims, the courts will not act to create additional judicial remedies, *even where a particular litigant does not have a remedy available under the statutory scheme.* This is particularly true in federal employment relationships, where Congress has provided a comprehensive civil service scheme to address disputes.

951 F.2d at 275 (citations omitted) (emphasis added). *See also Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *Pereira v. United States Postal Serv.*, 964 F.2d 873, 875 (9th Cir. 1992) ("Pereira's [constitutional] claim lacks merit because the collective bargaining agreement itself, and the concomitant ban on judicial review . . . are themselves generated by statute; they are part of Congress'[s] overall remedial scheme.").

We agree with the district court and hold that the PRA (via the plaintiffs' collective bargaining agreements) pre-empts *Bivens* claims like those asserted in this case. The district court's decision on this issue is affirmed.

II. FTCA Claims.

A. FECA Coverage.

The district court next turned to the provisions of the Federal Employees' Compensation Act (FECA) to analyze plaintiffs' FTCA claims. The FECA provides compensation for personal injuries that federal employees "sustain[] while in the performance of his duty." 5 U.S.C. § 8102(a) (1994).

The FECA functions as a federal workers' compensation act and provides a substitute for, not supplement to, recovery. "In enacting [FECA], Congress adopted the principal compromise—the 'quid pro quo'—commonly associated with workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). The district court held that this remedy is exclusive of any other remedy including the FTCA. *See also Avasthi v. United States*, 608 F.2d 1059, 1060 (5th Cir. 1979). The district court considered the issue of whether a substantial question existed as to "whether plaintiffs' claims of emotional distress are within the coverage of the FECA."

Federal courts are divided on this question. The Fifth Circuit has yet to answer it, but we have held that where a "substantial question" exists as to FECA coverage, a tort action is barred unless the Secretary of Labor determines that the FECA does not apply. *See Avasthi*, 608 F.2d at 1060. The district court found that a "substantial question" existed as to FECA coverage and held that the plaintiffs could not maintain their FTCA actions unless and until the Secretary of Labor determined that their claims were *not* covered by the FECA.

Because Harrell did not submit his FTCA claims to the Secretary of Labor and since a "substantial question" existed with regard to coverage of his claims under the FECA, they were pre-empted. The court dismissed Harrell's FTCA claims without prejudice. We affirm this ruling.

The district court held that Bennett could pursue her FTCA claims because she submitted them to the Secretary of Labor. The United States cross-appeals this ruling which allowed Bennett's claims to go to trial.[6] It argues that the district court should have held that *all* of the FTCA claims were precluded by the FECA.

Bennett's second FTCA claim was for emotional distress based on alleged on-the-job harassment. As noted above, employees may not bring FTCA claims that arise out of federal employment relationships until they submit the claim to the Secretary of Labor for a determination of FECA coverage. While Bennett submitted her claim, it was not denied because of lack of coverage under the FECA, but for lack of proof. By ruling on the sufficiency of the evidence, the Secretary thought coverage existed.[7] Thus, the

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6 The district court held a bench trial on Bennett's two claims for emotional distress. The court found for the United States on the first claim and for Bennett on the second claim. Bennett appeals the district court's ruling on her first claim. *See* discussion *infra*.

7 Plaintiffs disagree with this assertion in that even if the claims did occur during the performance of their work duties, there is not a "substantial question" that they are covered by the FECA. Plaintiffs argue that their claims are "dignity torts" that did not result in physical injury. They argue that FECA covers "injury by accident," *see* 5 U.S.C. § 8101(5) (1994), and that the FECA anticipates that employees will suffer a disability causing the employee to perform restricted duty. If no medical or disability benefits, then there is not [sic] disability claim. We reject this

(Continued on page App. 10a)

district court did not have jurisdiction to try the claim. *See White v. United States*, 143 F.3d 232, 234 (5th Cir. 1998) ("FECA vests with the Secretary of Labor the power to 'administer, and decide all questions arising under FECA,' 5 U.S.C. § 8145, and the Secretary's action in allowing or denying an award under FECA is final and conclusive and not subject to review by a court of law, 5 U.S.C. § 8128(b)."). The award of damages to Bennett is reversed.[8]

B. Bennett's First Emotional Distress Claim.

Bennett's first FTCA claim was also for emotional distress and was based on facts surrounding the interview. The district court dismissed this claim at the conclusion of the bench trial because Bennett exceeded her authority as a union steward. Bennett charges that this ruling was erroneous. We disagree.

The district court's *legal* determination of the limits of Bennett's authority as a steward is correct. She advised Harrell that he had the right to an attorney and that he did not have to answer any questions. At that point Bennett only had the right to remain in the interview as long as she did not interfere with the legitimate employer objective of conducting an orderly investigatory interview of Harrell's involvement in the altercation and his possession of a gun on postal property. *See National Labor Relations Bd. v. J.*

(Continued from page App. 9a)
argument. Had the Secretary of Labor agreed with this, the Secretary would have dismissed the claim for lack of coverage; however, the dismissal was based on lack of proof.

[8] Because we find that a "substantial question" exists as to FECA coverage of plaintiffs' tort claims, it is unnecessary for us to examine the district court's determination that these claims are not pre-empted by the CSRA and the PRA.

Weingarten, Inc., 420 U.S. 251, 258, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975); *Southwestern Bell Telephone Co. v. N.L.R.B.*, 667 F.2d 470, 473-74 (5th Cir. 1982). The district court found Bennett exceeded her authority as union steward by interfering with the interview. The district court's *factual* determination that Bennett interfered with the interview is not clearly erroneous. *See Gebreyesus v. F.C. Schaffer & Assoc's, Inc.*, 204 F.3d 639, 642, (5th Cir. 2000) ("The standard of review for bench trials is well-established: 'findings of fact are reviewed for clear error; legal issues de novo.' ") (quoting *F.D.I.C. v. McFarland*, 33 F.3d 532, 536 (5th Cir. 1994)). Therefore, the district court's dismissal of Bennett's first FTCA claims for emotional distress claim is affirmed.

CONCLUSION

The district court's ruling that plaintiffs' *Bivens* claims are preempted by the CBA as per *Bush* is AFFIRMED. The district court's dismissal of Harrell's claims because he did not submit them to the Secretary of Labor is AFFIRMED. The district court's ruling that Bennett could pursue her FTCA claim for emotional distress because she submitted the claim to the Secretary of Labor and said claim was denied by the Secretary of Labor is REVERSED. The district court's dismissal of Bennett's first FTCA claim for emotional distress because she exceeded her authority as union steward is AFFIRMED.

AFFIRMED in part, REVERSED in part.

APPENDIX B

SOUTHERN DISTRICT OF MISSISSIPPI
FILED

NOV 24 [1998]

BY JT NOBLIN, CLERK DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MELANIE BENNETT AND LYNN HARRELL Plaintiffs

VS. CIVIL ACTION NO. 3:97CV745BN

RICHARD BARNETT, KEVIN FORD,
JACK HARRIS AND GUY ROBINSON Defendants

OPINION AND ORDER

This cause is before the court on the following motions: (1) Motion for Partial Summary Judgment filed by Plaintiffs; (2) Motion for Preliminary Hearing filed by Plaintiffs; (3) Motion to Dismiss for Failure to State a Claim filed by Defendants; (4) Motion to Dismiss, and in the Alternative, for Summary Judgment filed by Defendants; (5) Cross Motion for Partial Summary Judgment filed by Plaintiffs; and (6) Motion to Strike Plaintiffs' Cross Motion for Partial Summary Judgment filed by Defendants. Having considered all motions, responses, rebuttals, supporting and opposing memoranda, and all attachments to each, the Court finds that Defendants' Motions to Dismiss with regard to Plaintiffs' claims of constitutional violations

and Plaintiffs' claims under the Federal Tort Claims Act are well taken and should be granted, and the remaining Motions are not well taken and should be denied.

I. Factual Background and Procedural History

In this case, Plaintiffs claim that Defendants are liable to them for violation of their constitutional rights and for other injuries. These claims arose out of an investigation of an altercation that occurred between two postal employees in Hattiesburg, Mississippi.

The facts in this case are virtually undisputed. On October 24, 1997 [sic], Plaintiff Lynn Harrell and Wayne Dahmer, both employees of the United States Postal Service, had a verbal confrontation while on the job. Harrell, who was working a midnight to morning shift, approached Dahmer and stated that he had heard rumors that Dahmer [had] been telling people that Harrell was attempting to break up the marriage of Dianne Clark, another postal employee. Dahmer was apparently angered by these accusations and informed Harrell that they could settle the matter at "any place and any time." Richard Barrett [sic], Customer Service Supervisor at the Postal Service office in Hattiesburg, heard about the confrontation and placed both Dahmer and Harrell on administrative leave. Barrett [sic] punched Harrell off of the clock at 5:25 a.m., and Harrell went home.

Because of the nature of the threats made during the encounter, the Postal Service immediately initiated an investigation. Postal Inspector Kevin Ford conducted the investigation. Harrell was called and told to report to the post office at 6:00 p.m. for an interview. The interview of Harrell is what led to the filing of this lawsuit.

Although Ford was in charge of the investigation, Melanie Bennett, the union steward for the

Hattiesburg postal employees, was permitted to sit in on Harrell's interview. During the interview, Ford questioned Harrell about the threats that Dahmer made. The systematic questioning turned to whether Harrell owned any guns or weapons. In fact, Harrell owned several guns and had brought a gun with him to work that day which he had left in his car.

According to Harrell, on the morning of October 24th, after he was placed on leave but before he returned to the post office at 6:00 p.m., Harrell and a friend made plans to go practice shooting targets in Tylertown, Mississippi with Harrell's 357 Magnum pistol and a couple of Harrell's rifles. When Harrell arrived at the post office at 6:00 p.m. for his interview, he realized the 357 Magnum was in his car, so he did not go through the employee gates but instead parked in customer parking. Harrell claims that he knew he was not allowed to bring a firearm on postal property. In fact, possessing a handgun on Postal property is a federal offense. Apparently Harrell did not believe his car was parked on postal property when it was parked in the customer parking lot.

Harrell told Ford that he had the 357 Magnum in his car on the premises. At that point, Ford sought assistance from Guy Robinson, a more experienced Postal Inspector, to assist with the interview. During a break in the questioning, Harrell consulted with Bennett. Harrell then told Ford and Robinson that he wanted to "clear up the gun issue" by acknowledging that he understood he could not bring a gun to work but that he believed that because the gun was in his car in the customer parking lot it was not on postal property. The inspectors then began trying to get Harrell to sign a consent to search form so they could retrieve the gun.

During Harrell's questioning, Bennett, the union steward, interrupted and attempted to get Harrell to leave the interview. Bennett advised Harrell not to make any more statements or sign anything. She

challenged and disrupted the investigation. Because Ford and Robinson felt that Bennett was acting beyond her role as union representative and was actually interfering with the investigation, they asked her to be quiet and cease her interference. She refused. Ford and Robinson, along with Bennett's supervisor Jack Harris, then ordered Bennett to leave the room. Bennett again refused. Robinson then picked Bennett up by her arms and sat her outside the doorway in the hall. According to Bennett, she then grabbed the door frames with both hands and stated that she was not going anywhere voluntarily without Harrell. Robinson then picked Bennett up by her arms and carried her down the hall and sat her down in front of the door leading to the supervisor's parking lot. He then opened the door with one hand and shoved Bennett out into the parking lot.

Plaintiffs claim that Harrell asked to leave the interview to call an attorney, but Robinson and Ford refused to allow him to do this. Defendants allege that Harrell was never in custody, illegally detained or falsely imprisoned. Harrell admitted in his deposition that he was not mistreated during the interview but that he was treated courteously and with respect. Although the parties appear to dispute this fact, this dispute is not material to the issues the Court will address in this Opinion and Order.

Harrell eventually agreed to sign the consent form allowing Robinson and Ford to search his car. However, Plaintiffs claim that the signature was coerced because Harrell was "in custody against his will" and because Robinson and Ford told Harrell that if he did not sign the consent to search form, his car would be impounded until a warrant was obtained.

The inspectors searched Harrell's car, found the gun and took it. They subsequently conducted a full investigation, and then returned the gun to Harrell. No charges were filed against Harrell and he was re-

turned to his former position with the Postal Service.

Because of the manner in which Robinson forced her from the postal service building, Bennett later filed criminal assault charges against Guy Robinson. On May 22, 1997, a trial on these charges was held in the Hattiesburg Municipal Court. The Municipal Court found Robinson not guilty and dropped all charges filed against him.

According to Bennett, during the work days following the incident with Harrell, her immediate supervisor Richard Barnett, acting upon Harris' "direct instructions, began harassing and intimidating Bennett in retaliation for her role in the incident." See Amended Civil Complaint, p. 4. Bennett claims she was suspended for fourteen days on pretextual grounds, needlessly investigated for "bogus charges," verbally reprimanded for such trivial matters as entering an office on her own time, and harassed in other ways. Plaintiffs allege that as a direct result of this harassment, Bennett required numerous counseling sessions. Plaintiffs also allege that after they filed the original Complaint in this matter, Bennett was fired in retaliation for her involvement in the lawsuit in violation of her right to free speech, but that she has since been reinstated to her previous position.

On October 11 [sic], 1997, Bennett and Harrrell filed a complaint against Richard Barnett, Kevin Ford, Jack Harris, the former Acting Postmaster of the Hattiesburg office, and Guy Robinson in the United States District Court for the Southern District of Mississippi. Jack Harris died after the lawsuit was filed and Plaintiffs have filed a Notice of Death of Party and Motion to Substitute. In the Complaint, Plaintiffs sued Ford and Robinson for alleged violations of Harrell's Fourth Amendment rights, namely that the search for the gun was illegal and not based upon probable cause, and Plaintiffs sued Ford, Robinson, and Harris for alleged violations of Har-

rell's Fifth and Sixth Amendment rights. Bennett also claimed that all the Defendants violated her First Amendment right to freedom of speech.

On July 27, 1998, Plaintiffs filed an Amended Complaint. In the Amended Complaint, Plaintiffs included all of the claims in their original Complaint and added claims under the Federal Tort Claims Act ("FTCA") as well as common law tort claims of intentional infliction of emotional distress, assault, battery, and false imprisonment. Plaintiffs added the United States as a Defendant.

The Court feels that it would be unnecessary (and probably confusing) at this point to set forth a chronological history of the tangled tributaries of motions, cross motions, responses, rebuttals, surrebuttal, and motions to strike that have been filed by both parties in this action. The Court notes that Plaintiffs' first Motion for Preliminary Hearing is not well taken and will be treated as a Motion for Partial Summary Judgment on the issues of Defendants' affirmative defenses. The Court also notes that both sides in this litigation concede that there are few disputed issues of material fact as to the events that let to the filing of the lawsuit.

II. Legal Standard

Defendants have filed a motion to dismiss for failure to state a claim as well and a motion to dismiss or in the alternative, for summary judgment. Plaintiffs have filed two motions for partial summary judgment. Although motions to dismiss and motions for summary judgment are interrelated and are often asserted in the alternative, there are differences in the legal standards applied under the two motions. The purpose of a Rule 12(b)(6) motion to dismiss is to test the statement of the claim for relief as set out in the complaint. *See Murray v. Amoco Oil Co.*, 539 F.2d 1385, 1387 (5th Cir. 1976). The motion may be

granted "'only if it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Barrientos v. Reliance Standard Life Ins. Co.*, 911 F.2d 1115, 1116 (5th Cir. 1990) (quoting *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir. 1986)). Thus, in considering a motion to dismiss, the court's inquiry is limited to the contents of the complaint. *Jackson v. Procunier*, 789 F.2d 307, 309 n. 4 (5th Cir. 1986).

In contrast, a motion for summary judgment goes beyond the pleadings and tests the sufficiency of the evidence a party can produce in support of those issues on which it will bear the burden of proof at trial. Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of mate-

rial fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighting conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962).

Although both parties have submitted materials outside of the pleadings, these materials were not necessary to the Court's decision in this matter. However, since the parties have no objections, the Court will treat Defendants' Motions collectively as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court will treat Plaintiffs' Motions for Partial Summary Judgment and Motion for Preliminary Hearing as a collective Cross Motion for Partial Summary Judgment.

III. Analysis

Instead of organizing its discussion around the motions and responses filed by the parties, the Court

will organize its analysis according to the two major issues raised by the parties: (1) Are Plaintiffs' constitutional claims barred under the principles set forth by the Supreme Court in *Bush v. Lucas* and its progeny? (2) Are Plaintiffs' FTCA claims barred under the Civil Service Reform Act, the Postal Reorganization Act or the Federal Employees Compensation Act?

A. Claims for Violations of Constitutional Rights

1. Failure to Sue Defendants in their Individual Capacities

Defendants note that Plaintiffs claim this action arises directly under the Constitution as recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). According to Defendants, the Fifth Circuit has noted that "*Bivens* actions are 'premised on the theory that victims of a constitutional violation by a federal agent have an implied right of action to recover damages against the official absent any statute conferring such a right.'" *Hessbrook v. Lennon*, 777 F.2d 999, 1001 (5th Cir. 1985), abrogated by *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) (citation omitted). A *Bivens* action only applies against parties in their individual capacities. *Williamson v. Dept. of Agriculture*, 815 F.2d 368, 380 (5th Cir. 1987). Defendants assert that on the face of Plaintiffs' original Complaint, Plaintiffs have not sued Defendants in their individual capacities, and for this reason, Defendants argue that Plaintiffs may not maintain a *Bivens* action against them.

Plaintiffs argue that they have not sued Defendants in their official capacities but have sued Defendants as individuals. The Court has examined Plaintiffs' Amended Complaint and notes that the Complaint does not state that Defendants are being sued

in their official, as opposed to individual, capacities. For this reason, the Court finds that the Plaintiffs have sued Defendants in their individual capacities.

2. Viability of *Bivens* claims in government employer-employee relationship

Defendants claim that under the holding of *Bush v. Lucas*, 647 F.2d 573, 575-77 (5th Cir.), aff'd, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) and its progeny, Plaintiffs' claims that their constitutional rights were violated must be dismissed. In *Bush*, the Supreme Court addressed the issue of whether *Bivens* applies in the context of a federal employer-employee relationship. The Supreme Court held that it did not. In reaching this conclusion, the court noted that in *Bivens*, the Supreme Court had indicated that there had been "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bush*, 462 U.S. at 375 (citing *Bivens*, 403 U.S. at 396). The court found that since the dispute arose out of the governmental employer-employee relationship, this constituted a "special factor" which counseled hesitation in the judicial creation of a remedy for the alleged deprivation of the employee's constitutional rights. *Bush*, 462 U.S. at 389-90.

The court noted that the area of federal personnel policy was one which had traditionally been subjected to close regulation by Congress and that Congress had already enacted an elaborate and detailed administrative procedure to remedy the various problems which arise out of this relationship. *Bush*, 462 U.S. at 385-86.

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and proce-

> dures–administrative and judicial–by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system. As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer, but it provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies.

Id. The court stated that the question before the court was whether an elaborate remedial system that had been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. *Id.* at 388. The court concluded that if a judicial remedy was to be provided to employees to redress situations where constitutional rights were allegedly violated, it should be at the instance of Congress and not the judiciary. *Id.* at 389.

Courts of appeal in virtually every circuit, including the Fifth Circuit, have recognized that, under the analysis employed in *Bush*, *Bivens* actions arising in the federal personnel context are precluded. *See Heaney v. U.S. Veterans Admin.*, 756 F.2d 1215, 1222 (5th Cir. 1985) (relief available to surgeon under the special regulatory scheme established by the VA to handle investigation, presentment, and determination of charges involving a professional employee precluded creation of new nonstatutory damages remedy; thus, surgeon was precluded from maintaining *Bivens* action). *See also Berry v. Hollander*, 925 F.2d 311, 315 (9th Cir. 1991) (holding that Veterans Administration physician was precluded from bringing *Bivens* action against VA); *Volk v. Hobson*, 866 F.2d

1398, 1403 (Fed.Cir. 1989) (holding that discharged Bureau of Indian Affairs educator could not maintain *Bivens*-type action against Bureau of Indian Affairs officials in their individual capacities); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961-62 (10th Cir. 1989) (former presidential management intern could not maintain *Bivens* claim based on his removal from the position).

In *Eure v. United States Postal Service*, 711 F. Supp. 1365 (S.D.Miss. 1989), the United States District Court for the Southern District of Mississippi through Judge Henry T. Wingate addressed claims very similar to the claims advanced by the Plaintiffs in this case. The plaintiff in *Eure* was a former postal employee who brought an action against the Postal Service alleging that in allowing its employees to harass and humiliate him, the Postal Service caused his constructive discharge and violated his constitutional rights. In its analysis of the viability of plaintiff's constitutional claims, the court discussed *Bivens* and *Bush*, and noted that plaintiffs had at their disposal a multi-step system for processing employee grievances. *Id.* at 1371. The court noted,

> Defendants have submitted an affidavit establishing that plaintiff Eure is a member of the American Postal Workers Union (APWU) and that at all relevant times the APWU and the Postal Service had in effect a collective bargaining agreement which provided the grievance procedure.

Id. The court concluded that because plaintiffs in their positions as federal employees of the Postal Service had access to the Congressionally approved grievance procedure of the collective bargaining agreement, the plaintiffs could not maintain their federal constitutional claims against the named individual Postal Service officials. *Id.*

Like the plaintiffs in Eure, Plaintiffs in this case

are members of the postal employees' union and have access to the grievance procedure of the Collective Bargaining Agreement. Despite the holdings of the above-cited cases, Plaintiffs argue that they should be allowed to maintain their *Bivens* action. Plaintiffs contend that there are not comprehensive procedural and substantive provisions giving Plaintiffs meaningful remedies against the United States as there were in *Bush*.

Plaintiffs note that the Postal Service and its employees are largely exempt from the Civil Service Reform Act (CSRA) coverage. See 39 U.S.C. § 1001(b). The CSRA does not provide an elaborate remedial system for postal workers. Plaintiffs explain that postal workers are employees of an independent establishment in the Executive Branch and that the Postal Reorganization Act ("PRA") of 1970, Pub.L.No. 91-375, 84 Stat. 731 (codified at 39 U.S.C. §§ 101 et seq.), with only a few limited exceptions, actually removed postal workers from the provisions of Title 5, U.S.C. (Government Organization and Employees) and placed them under the provisions of Title 29, U.S.C. (Labor) and Title 39, U.S.C. (U.S. Postal Service).

In addition, Plaintiffs note that postal workers are not covered by the provisions of 5 U.S.C. § 2301, et seq. which establishes the principles of the merit system of employment and forbids prohibited personnel practices, including violations of constitutional rights, or by the Whistle-blowers Protection Act, Pub. L.No. 101-12, 103 Stat. 16, or by the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

Plaintiffs concede that postal workers have available to them the grievance-arbitration procedures of the postal workers' collective bargaining agreements provided by Congress. Plaintiffs also concede that Congress expressly authorized the Postal Service and bargaining representatives to include in their collective bargaining agreements

> any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration, or the parties may adopt any such procedures by mutual agreement in the event of a dispute.

39 U.S.C. § 1206(b). However, Plaintiffs contend that these procedures do not constitute "alternative procedures" which provide meaningful remedies against the Postal Service or the United States for violations of their constitutional rights. Plaintiffs argue that the agreements in the collective bargaining agreements are not "statutory mechanisms." Plaintiffs also argue that the collective bargaining agreements do not provide meaningful remedies.

Finally, Plaintiffs examine the legislative history of the Postal Reorganization Act ("PRA") and conclude that the purposes of the PRA were to free the Post Office Department from political pressure, make the Postal Service an independent executive agency, improve the efficiency of the mail system, improve labor management relations, and make the Postal Service self-supporting. Plaintiffs argue that in passing the PRA, Congress intended to treat postal workers as private sector employees who would bargain for rights in collective bargaining agreements. Plaintiffs argue that the PRA was not formed to force postal workers to bargain for constitutional rights. Plaintiffs maintain that violations of their constitutional rights should not be treated as grievances arising under the collective bargaining agreements.

The Court finds that while Plaintiffs' arguments are certainly ambitious, the Court is bound by the above-cited decisions of the United States and the Fifth Circuit holding that where a comprehensive remedial system is available for federal employees, such a system constitutes a "special factor" counseling against a judicially created cause of action for

federal officials' constitutional torts, even where those remedies provide less than complete relief to an injured plaintiff. *See Bush*, 367 U.S. at 388-90. The issue of whether the Postal Service Collective Bargaining Agreement is the exclusive remedy available to postal workers has already been addressed and answered in the affirmative by a court in this district. This Court agrees with that reasoning. *See Eure*, 711 F.Supp. at 1371. Plaintiffs have set forth no facts distinguishing *Eure* from the present case, and Plaintiffs have provided no compelling reason this Court should deviate from the court's analysis in *Eure*. Plaintiffs' *Bivens* claims that Defendants are liable to them for violation of their constitutional rights are precluded because these claims arose out of a federal employer–employee relationship. For these reasons, the Court finds that Plaintiffs' claims that their constitutional rights were violated are dismissed.[1]

B. FTCA Claims

Defendants argue that Plaintiff's [sic] amended claims against the United States brought under the FTCA must be dismissed. These claims include tort claims of assault, battery, false imprisonment, false

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[1] Because the Court is dismissing Plaintiffs' constitutional claims under *Bush*, the Court must deny as moot Plaintiffs' first Motion for Partial Summary Judgment in which Plaintiffs ask the Court to rule upon several legal issues relevant to the merits of their constitutional claims. The constitutional claims are being dismissed because the Court finds that the Collective Bargaining Agreement is Plaintiffs' exclusive remedy. There is no need for the Court to address the merits of the Plaintiffs' constitutional claims. Since the Court is denying the Motion for Partial Summary Judgment, the Court also denies the Motion to Stay Proceedings or to Extend Time to File Response to Motion for Partial Summary Judgment filed by Defendants as this Motion is moot.

arrest, and intentional infliction of emotional distress.

Defendants contend that Plaintiffs' remedy for these torts lies in the CSRA. Defendants allege that any remedy under the FTCA is pre-empted by Chapters 10 and 12 of the Postal Reorganization Act ("PRA"), 39 U.S.C. §§ 1001-1011, 1201-1209, which incorporate Chapter 75 of the CSRA, 5 U.S.C. §§ 7501-7543. Defendants assert that the CSRA remedies are the comprehensive and exclusive procedures for settling work-related controversies between federal civil service employees and the federal government.

Defendants argue that even if the torts claimed against Defendants were not covered by the CSRA and PRA, these torts are precluded under the FTCA because they are covered under the Federal Employees Compensation At ("FECA"). Defendants claim that FECA contains an exclusive liability provision that was designed to protect the government from suits under statutes such as the FTCA that had been enacted to waive the government's sovereign immunity. By enacting these provisions, Defendants urge that Congress adopted the principal compromise or "quid pro quo" commonly found in workers compensation legislation: employees are guaranteed the right to seek immediate, fixed benefits, regardless of fault and without the need for litigation, but in return the employees lose the right to sue the government. *See Lockheed Aircraft v. United States*, 460 U.S. 190, 193-94, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). Defendants contend that if there is a substantial question as to whether or not the injury occurred in the performance of the employee's duties, an action under the FTCA may not be maintained. Instead, the employee must first seek recovery under the FECA.

Defendants maintain that only if the Secretary of Labor determines that the injuries are not covered by FECA may the employee pursue FTCA remedies. De-

fendants assert that since Plaintiffs' injuries arose out of the performance of their duties as postal workers, FECA applies and Plaintiffs' FTCA claims are precluded.

In their Response,[2] Plaintiffs argue their FTCA claims are not precluded. Plaintiffs assert that CSRA is largely inapplicable to postal workers. As support for this proposition, Plaintiffs cite 5 U.S.C. § 2105(e) of the CSRA which states, "Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title." Plaintiffs contend that the phrase "except as otherwise provided by law" refers to, in part, the PRA, which incorporated the Veterans Preference Act of 1944, 58 Stat. 390 (protecting veterans in federal employment by extending the procedural and substantive protections to adverse actions other than removals, and adding the right to respond orally and to appeal to the Civil Service Commission, as provided in the Lloyd LaFollette Act of 1912). Plaintiffs assert although a very small part of the CSRA is applicable to some postal employees (but not Plaintiffs), the PRA did not directly incorporate any of the CSRA. Finally, Plaintiffs allege that the CSRA applies only to personnel actions. Plaintiffs contend that in pursuing their tort claims, Plaintiffs are not challenging any personnel actions. For these reasons, Plaintiffs dispute Defendants' assertion that the CSRA prevents them from bringing claims under the FTCA.

Plaintiffs also dispute Defendants' contention that their FTCA claims are barred by the PRA. Plaintiffs note that Congress has not expressly stated that the PRA shall preempt claims under the FTCA. Plaintiffs assert that there is no conflict between the

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2 In response to the Motion to Dismiss, Plaintiffs filed a Motion for Oral Argument and Hearing upon Defendants' Motions to Dismiss. The Court denies the Motion for Oral Argument.

PRA and state law such that allowing Plaintiffs' state tort claims to be brought under the FTCA would frustrate achievement of the congressional objectives embodied in the PRA. Plaintiffs note that the PRA provides for collective bargaining and embodies a comprehensive labor law scheme that was modeled after private sector labor law. However, Plaintiffs argue that state law tort claims do not conflict with this objective. Plaintiffs further argue that the PRA is not comprehensive enough to occupy the entire field of employee claims and preempt Plaintiffs' FTCA claims.

Finally, Plaintiffs argue that their FTCA claims are not barred by the FECA. First, Plaintiffs note that Plaintiff Bennett did file a FECA claim for stress related to the events of October 24, 1996. She claims that this stress prevented her from reporting to work the next day and resulted in a visit to a clinical therapist. The FECA claim was denied. Bennett requested a review of the written record, and the claim was finally denied by the Hearing Officer in the Secretary of Labor's Office in Washington D.C. in June 1997. Plaintiffs contend that since the Secretary of Labor has found no FECA coverage, Bennett is free to proceed under the FTCA.

Second, Plaintiffs disagree with Defendants' assertion that the injuries of which Plaintiffs complain are covered under the FECA. Plaintiffs argue that even if the injuries did occur during the performance of Plaintiffs' work duties, there is not necessarily a "substantial question" that they are covered by FECA. Plaintiffs assert that the Secretary of Labor would certainly find that no coverage exists for Plaintiffs' injuries under FECA. Plaintiffs note that Harrell's claims are for false arrest and false imprisonment while Bennett's claim is intentional infliction of emotional distress. Plaintiffs assert that these are dignitary torts which resulted in mental and/or psychological injury, not physical injury. The injuries resulted in no lost time from work, no lost pay, and

no medical bills.

Plaintiffs note that FECA, on the other hand, covers "injury by accident." 5 U.S.C. § 8101(5). Plaintiffs aver that FECA expressly anticipates that the injured employee will suffer a disability causing the employee to perform restricted or limited duties upon his return to work. *See* 20 C.F.R. § 10.123(c)(2). Plaintiffs claim that where there are no medical expenses or disability benefits, there is no FECA claim.

Generally, the PRA governs employment relations within the Postal Service. *Kennedy v. United States Postal Service*, 145 F.3d 1077, 1078 (9th Cir. 1998) (citing 39 U.S.C. §§ 1001-11 (1998)). However, one section of the PRA provides that the provisions of Chapter 75 of the CSRA, 5 U.S.C. §§ 7501-43 (1998), relating to adverse employment actions apply to Postal Service employees. *See* 39 U.S.C. § 1005(a)(1). At least one court has described the role of the CSRA as follows:

> The CSRA is an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary actions by supervisors and procedures–administrative and judicial–by which improper action may be redressed. *Bush*, 462 U.S. at 385, 103 S.Ct. at 2415. Therefore, a federal employee may not bring a claim under the FTCA, but must proceed instead under the CSRA. *Morales v. Department of the Army*, 947 F.2d 766, 768-69 (5th Cir. 1991); *Rollins v. Marsh*, 937 F.2d 134 (5th Cir. 1991). The CSRA remedies are the comprehensive and exclusive procedures for settling work-related controversies between federal civil service employees and the federal government. *United States v. Fausto*, 484 U.S. 439, 444-46, 108 S.Ct. 668, 672-73, 98 L.Ed.2d 830 (1988); *Bush v. Lucas*, 462 U.S. at 385-86, 103 S.Ct. at 2415.

Ross v. Runyon, 858 F.Supp. 630, 635 (S.D.Tex. 1994). The CSRA permits federal employees to challenge "prohibited personnel practices" by their supervisors. *Jense v. Runyon*, 990 F.Supp. 1320 (D.Utah 1998). "Prohibited personnel practices" include a variety of personnel decisions and actions, such as appointments, promotions, disciplinary actions, transfers, and decisions concerning pay and benefits. *Id.*

Defendants are correct that federal employees alleging employment-related tort claims subject to the CSRA may not bring an action under the FTCA. *Kennedy*, 145 F.3d at 1078. However, the Court finds that the tort claims asserted by Plaintiffs in their Amended Complaint are not employment-related as defined by the CSRA. Plaintiffs are not complaining about appointments, promotions, disciplinary actions, transfers, or decisions concerning pay and benefits. Plaintiffs claim that Defendants committed torts of assault, battery, false arrest and false imprisonment during an investigation of the possession of a gun on postal property by Harrell. While the investigation did arise out of a federal employment relationship, the Court does not find that the claimed torts were "prohibited personnel practices" as contemplated by the CSRA. *See Jense*, 990 F.Supp. at 1330 (holding that assault and battery claimed by plaintiff and arising out of alleged sexual harassment by coworker was not "prohibited personnel action" to which CSRA applied). For this reason, the Court finds that neither the PRA nor the CSRA preempts Plaintiffs' FTCA claims.

With regard to Defendants' assertion that Plaintiffs' claims are covered by the FECA and thus barred under FTCA, the Court notes that the FECA provides compensation for a federal employee's personal injuries "sustained while in the performance of his duty." 5 U.S.C. § 8102(a). The remedy provided by FECA is exclusive of any other remedy including FTCA. *Avasthi v. United States*, 608 F.2d 1059, 1060 (5th Cir.

1979). The question the Court must consider is whether Plaintiffs' claims of emotional distress are within the coverage of FECA. If they are not, then the Plaintiffs may continue to pursue their FTCA claims.

The federal courts of appeal are divided on the issue of whether FECA encompasses claims for the intentional infliction of emotional distress. *See Sheehan v. United States*, 896 F.2d 1168, 1174 (9th Cir. 1990) (holding that FECA compensates only for physical harm). *But see McDaniel v. United States*, 970 F.2d 194 (6th Cir. 1992) (affirming district court finding that FECA covers emotional injuries); *Heilman v. United States*, 731 F.2d 1104, 1111 n. 6 (3rd Cir. 1984) (holding that FECA covers claims for intentional torts); *Burke v. United States*, 644 F.Supp. 566 (E.D.La. 1986) (holding that FECA covers claims for intentional infliction of emotional distress). The Fifth Circuit has not adopted either of these views, but has held that where a "substantial question" exists as to FECA coverage, a tort action is barred unless the Secretary determines that the FECA does not apply. *Avasthi*, 608 F.2d at 1060; *Bailey v. United States*, 451 F.2d 963, 965 (5th Cir. 1971). *See Williams v. United States*, 565 F.Supp. 59 (N.D.Miss. 1983) (noting split of authority regarding whether mental anguish and emotional distress are covered under FECA and holding that there was at least a question as to FECA coverage for plaintiff's alleged emotional injuries).

The Court finds that there is a substantial question as to whether FECA applies to Plaintiffs' injuries in this case. For this reason, Plaintiffs may not maintain an action under the FTCA unless and until the Secretary of Labor has determined that their claims are not covered by FECA.

As stated earlier, Bennett submitted a claim under the FECA which was denied by the Office of

Workers' Compensation. Bennett appealed the denial and her appeal was also denied by the Secretary of Labor. Since the Secretary of Labor has determined that Bennett's claim is not covered, the Court finds that Bennett may pursue her FTCA claims in this Court.

However, Plaintiffs have presented no evidence indicating that Harrell submitted a FECA claim, and the Court will presume that Harrell has not submitted such a claim. Since there is at least some question as to whether Harrell's tort claim would be covered under FECA, the Court finds that FECA preempts Harrell's FTCA claims, and his claims must be dismissed as a matter of law.

C. Other Claims

Defendants filed a Reply to their Motion to Dismiss in which they alleged new and different grounds upon which Plaintiffs' Complaint should be dismissed. Specifically, Defendants attacked the merits of Plaintiffs' constitutional claims against Defendants. Plaintiffs then filed a Cross Motion for Partial Summary Judgment and Reply Memorandum to Defendants' Reply arguing that the claims should not be dismissed. Defendants filed a Motion to Strike the Cross Motion for Partial Summary Judgment on the grounds that the Cross Motion for Partial Summary Judgment and Reply to Defendants' Reply was actually a Surrebuttal for which Plaintiffs had not received leave of Court before filing. Plaintiffs then filed a Response to the Motion to Strike with a Motion for Leave to File a Supplemental Brief in Reply to Defendants' Summary Judgment arguments in their Reply and Cross Motion for Partial Summary Judgment urging the Court not to dismiss their constitutional claims on their merit.

Since Defendants alleged new grounds for dismissal in their Reply, the Court finds that Plaintiffs

should have been allowed to file a Surrebuttal. For this reason, Defendants' Motion to Strike is denied, and the Court accepts Plaintiffs' Cross Motion for Partial Summary Judgment as if the Court had granted Plaintiffs leave to file a Surrebuttal. However, the Court notes that it has already found that Plaintiffs' constitutional claims must be dismissed under the holding of *Bush* and its progeny. For this reason, Defendants' Reply and Plaintiffs' Response thereto are moot. Plaintiff's Cross Motion for Partial Summary Judgment is also moot and is, therefore, denied.

IV. Conclusion

The Court finds that Plaintiffs' *Bivens* claims that Defendants violated their constitutional rights are preempted by the Collective Bargaining Agreement under the holding of *Bush* and its progeny. For this reason, Plaintiffs' claims that Defendants violated their constitutional rights are dismissed. The Court finds that Plaintiffs' FTCA claims are not precluded by the CSRA or the PRA. However, the Court finds that there is at least some question whether these claims are covered under FECA, and for this reason, Plaintiffs are required to submit these claims to the Secretary of Labor. If the Secretary of Labor denies coverage of the claims, then Plaintiffs may pursue the claims under the FTCA. Since Bennett has submitted her claim for mental and emotional distress under FECA and since the claim was denied by the Secretary of Labor, Bennett may pursue [] this claim under the FTCA. However, the Court finds that Harrell has not submitted any FECA claim and for this reason, Harrell's FTCA claims must be dismissed without prejudice.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion for Preliminary Hearing [] should be and hereby is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss for Failure to State a Claim, asserted in Defendants' Response to Plaintiffs' Motion for Preliminary Hearing [], should be and hereby is granted.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment [] should be and hereby is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Proceedings, or to Extend Time to File Response to Motion for Partial Summary Judgment [] should be and hereby is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment [] should be and hereby is granted in part and denied in part.

IT IS FURTHER ORDERED that Plaintiff's Motion for Oral Argument and Hearing upon Defendants' Motion to Dismiss [] should be and hereby is denied.

IT IS FURTHER ORDERED that Plaintiffs' Cross Motion for Partial Summary Judgment [] [] should be and hereby is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Strike the Cross Motion for Partial Summary Judgment [] should be and hereby is denied.

The remaining claims in this case are Plaintiff Melanie Bennett's FTCA and common law tort claims against the United States. Because Plaintiffs' *Bivens* claims have been dismissed, Richard Barnett, Kevin Ford, the estate of Jack Harris, and Guy Robinson are dismissed as Defendants from this action.

SO ORDERED this the 24th day of November, 1998.

S/William H. Barbour, Jr.
United States District Judge